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WHEN IT'S ALL SAND AND DUNE

A look at whether the government's sand dune construction on
private property requires compensation

Jason Cherchia

I. Introduction

The issue of property protection has grown in importance since Hurricane Sandy. Per mile of coast, New Jersey has the highest amount of property at risk from coastal flooding.¹ Every year, during hurricane season, New Jersey residents and property owners must hold their breath, hoping that a hurricane does not come up the coast and wreak havoc on the shore. It appeared that another bullet was dodged in 2012 until the end of October, when Hurricane Sandy travelled up the US coast and caused \$36.8 billion² worth of destruction. Thus the issue of property protection is critical to shore culture.

Cornelia Dean, in her writings on coastal erosion notes three methods for dealing with the problem: armor, beach nourishment, and retreat.³ Before the twentieth century, retreat was the most common method as people recognized they did not have the resources or technology to protect coastal property.⁴ As recently as fifty years ago in some parts of the country, residents along the Mid-Atlantic coast, which is often affected by major storms, decided to abandon their

¹ *The Effects of Recent Coastal Storms on the Beaches and Dunes along the New Jersey Shore: Hearing before the State Beach Erosion Comm'n*, 37 (N.J. 1998), <http://www.njleg.state.nj.us/legislativepub/Pubhear/030498dt.PDF>.

² Terrence Dopp, *Christie Says New Jersey Sandy Damage No \$36.8 Billion*, BLOOMBERG. (Nov. 28, 2012, 3:48 PM), <http://www.bloomberg.com/news/2012-11-28/christie-says-new-jersey-s-sandy-damage-rises-to-36-8-billion.html> [hereinafter State Beach Erosion Comm'n]. The figure represents funds that will be necessary to rebuild and prevent future damage.

³ CORNELIA DEAN, *AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES* 185 (1999).

⁴ *Id.*

property when they realized that they would have a difficult time protecting it.⁵ However, more recently, as coastal land grows in value, so does the property that sits on it, making it more worthwhile to protect.⁶

As a result, in 1972, Congress adopted the Coastal Zone Management Act in order to provide states with a framework with which they can protect their shoreline.⁷ The CMZA recognizes the national need to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations.”⁸ It does so by encouraging states to implement a program of coastal management that protect, among other things, beaches and sand dunes in particular.⁹ Furthermore, the CMZA envisions participation by the state and local governments and the public in development and execution of a plan to protect the coast.¹⁰ States have approached the beach armor task differently. Some have banned coastal armor, others require buildings to be set back a certain distance from the beach.¹¹

Part II of this paper will talk about the plan that New Jersey has implemented and executed in the last twenty years. It will also discuss what is necessary to construct a beach capable of protecting the property behind it and the problem that the state and municipalities have run into. Finally, this section will describe the problem that this paper will deal with, namely whether the government takes land requiring compensation.

Part III will discuss relevant takings caselaw. It will discuss physical invasions and how the Court has shied away from announcing any bright-line rule for finding a taking. This section will present one argument, that while potentially futile before a court, would justify a finding that

⁵ *Id.* at 185-86.

⁶ *Id.* at 187.

⁷ *Id.* at 188.

⁸ Coastal Zone Management Act (CMZA) of 1972, 16 U.S.C. § 1452(1) (West, 1992).

⁹ 16 U.S.C.A. § 1452 (2)(a) (West, 1992).

¹⁰ 16 U.S.C.A. § 1452(4) (West, 1992).

¹¹ DEAN, *supra* note 3, at 189.

dune placement would not constitute a physical invasion. Sand dune projects should be characterized under this class of cases, rather than a physical invasion, because these projects better fit into this theory of cases, including the one espoused by following section.

Part IV will discuss *Lucas, Palazzolo*, and the background principles theory. It is here that the dune projects implemented by New Jersey will likely succeed in court. This section will also offer examples of the application of the background principles theory of takings.

Part V will discuss the background principles in New Jersey property law. These principles include those announced in New Jersey state court cases, as well as Supreme Court and other federal court decisions. This section will also present theories founded on state background principles that would justify a finding that no compensation is required for the state's sand dune projects.

Finally, Part VI will conclude and generally outline the arguments presented and provide a prediction on the future of the sand dune projects.

II. The New Jersey Plan and the Problem

Dean's suggestion that sometimes the easiest practice is leaving, recognizing that property protection is too costly, is not feasible in New Jersey. In the late 1990s, New Jersey took in \$15 billion in travel and tourism, a large part of that coming from the shore.¹² That number nearly tripled in 2012 to nearly \$45 billion.¹³ Surely there is a strong motivation to protect the homes, businesses, and other property from destruction. In many areas, the only feasible means of protection is by constructing sand dunes and replenishing the beach.

First, the New Jersey Department of Environmental Protection adopted the Green Acres

¹² *State Beach Erosion Comm'n*, *supra* note 1 at 3.

¹³ *Despite Sandy, Jersey Shore Sets Tourism Record with \$40 Billion in Revenue*, NJ Today (Mar. 21, 2013), <http://www.njtvonline.org/njtoday/2013/03/21/despite-sandy-jersey-shore-sets-tourism-record-with-40-billion-in-revenue/>.

Mission which is meant to preserve and create a system of state open spaces for public enjoyment by preventing new development.¹⁴ The Blue Acres program, a subset of Green Acres, deals with areas that tend to flood uses its limited budget to purchase areas prone to flooding from private owners and place them in the custody of the state.¹⁵ This would stop further development on the shore and prevent more property from being at risk. A proposal that is similar to the Blue Acres concept has been offered that would protect some of the areas along the coast, such as Whale Beach, discussed below, from commercial development.¹⁶

To protect existing property, especially in Monmouth and Ocean Counties, where most of the shore is fully developed, the state has engaged in a process that engineers beaches. An engineered beach is one that has a specific cross section; it has a specific elevation and slope, and a profile so that it can be measured and replenished if necessary.¹⁷ The advantage to maintaining engineered beaches is that because the dimensions are measured, erosion is easily noticeable and problem areas can be identified relatively quickly.¹⁸ The state developed a plan with the Army Corps of Engineers to replenish beaches all along the New Jersey coastline under the Shore Protection Program.¹⁹ This process has a history of reducing storm damage and protect infrastructure.²⁰

After two storms in 1998, a Cape May community, known as Whale Beach, saw erosion of dunes and subsequent ocean flooding across a main roadway. This is particularly dangerous,

¹⁴ *Green Acres Program*, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, <http://www.nj.gov/dep/greenacres/> (last visited Apr. 20, 2013).

¹⁵ *Id.*

¹⁶ *State Beach Erosion Comm'n*, *supra* note 1, at 19 (1998).

¹⁷ *Id.* at 11.

¹⁸ *Id.*

¹⁹ *Id.* at 16.

²⁰ *Id.* at 15-16. Early projects were completed in Ocean City and Sea Bright-Monmouth Beach. Eventually, the Monmouth County project was expanded to cover a greater area. These early projects demonstrated this scheme could be successful.

not only to property, but also because the roadway is a primary evacuation route for the area.²¹ Where at one point in the 1970s, the sand was elevated enough to allow a beachgoer to walk directly up to a shoreline bunker (constructed during WWII), up until 2005 there was no access because too much sand has been washed away and the shoreline moved inward.²² In 2005, replenishment efforts moved the shoreline out and the encampment was reclaimed.²³ Without protection or maintenance, the water will erode the beach, eventually exposing the bulkheads. If left untreated, erosion of materials behind the bulkhead will continue, which will eventually cause the bulkhead itself to fail.²⁴ This is even more dangerous for houses that sit on pilings.²⁵

Sand dunes, therefore, are a critical component of the shoreline protection scheme. They work in conjunction with other elements including the bulkhead, stone revetment, and the beach berm to protect the shore.²⁶ If one of those elements fails, the entire system is weakened and susceptible to flooding.²⁷ Some erosion is natural and cyclical so that some of the sand washed away over the summer may be washed back in the winter, but the reality of erosion is that not all of it will come back, and some replenishment is necessary.²⁸ Dunes need about 100 feet of beach or else everything that is put in will be away with the next major storm.²⁹ Therefore, one cannot separate the importance of rebuilding dunes from the importance of rebuilding beach.

Beach replenishment and protection, particularly the placement of sand dunes, is controversial. This is true, even in the wake of Hurricane Sandy, in which coastal areas protected

²¹ *Id.* at 12.

²² *Id.* at 13.

²³ *Battery 223, Cape May, New Jersey*, <http://www.stinch.com/military/battery223.html> (last visited April 20, 2013).

²⁴ *State Beach Erosion Comm'n*, *supra* note 1, at 13.

²⁵ *Id.* at 14.

²⁶ A berm is a raised area of the beach, where there is a significant elevation, greater than the natural slope of the beach. A bulkhead is an underground foundation that supports the dune. The stone revetment serves as a foundation for the beach by sitting under the sand and prevents major erosion of the shore.

²⁷ *State Beach Erosion Comm'n*, *supra* note 1, at 45-46.

²⁸ *Id.* at 46.

²⁹ *Id.* at 51.

by sand dunes generally fared better than those left unprotected. Often, replenishment requires working with privately owned property. New Jersey is a high tide state, meaning that private owners can own to the high tide line. Easements are necessary to allow the government to manage the beach and maintain the dunes in perpetuity.³⁰ As a result, many citizens are concerned. Dunes take up a large portion of some private owners' property and some have been installed without an easement.³¹ As inducement, the municipalities sometimes allow for construction of a larger structure in return for the easement, but not every private owner receives that offer.³² In some cases, the state is vague about what the easement will allow the state to do or for how long it will last.³³ The response, generally, by proponents of the government's program is that easements are necessary to protect the shore; that the municipality is acting to protect everyone, including the owners with property behind the beachfront owners. They say that the beachfront owners should not be able to put inland property at risk.³⁴

Most residents of Jersey shore area communities want to allow the local and state governments to come in to replenish lost beaches and dunes while many others do not. The greatest obstacle to effective dune construction is the homeowner associations that do not want to let the government in. Some residents, realizing the potential for a calamity down the line, have come together to hire lawyers to force these associations to build dunes to prevent flooding.³⁵

Those in opposition argue that the government's plan for dune placement is too vague

³⁰ *Testimony from invited individuals and the public on beach erosion and fisheries management issues; representatives from the New Jersey Department of Environmental Protection, the United States Army Corps of Engineers, local governments, academic institutions, and the fishing industry have been invited: Hearing before the Senate Env't Comm 74* (N.J. 2006), <http://www.njleg.state.nj.us/legislativepub/pubhear/sen080406.pdf>.

³¹ *Id.* at 53-61.

³² *Id.* at 46.

³³ *Id.* at 58-59.

³⁴ *Id.* at 77.

³⁵ *Watchdog: Residents Battle beach Owner for Storm Protection*, ASBURY PARK PRESS (January 14, 2013), <http://www.app.com/apps/pbcs.dll/article?AID=2013301130033>.

and that government access to their private property would not be limited enough.³⁶ They also say that their property values will go down because they can't build on all of their land or because they lose their views.³⁷ As a result, they often want compensation from the state under a takings theory. This paper will discuss these cases, where the government enters without an easement and constructs the dune. Often, the government has attempted to come to an agreement with the owner, but ultimately, there is no agreement. It is difficult to deny that the government's action is necessary. This shoreline protection scheme requires dunes to be continuous so that they can effectively prevent flooding and storm surge from causing damage.

If the systematic maintenance of dunes on private property and a prohibition on removal is a taking requiring compensation, the state's program surely will be too expensive to be comprehensive and effective in protecting property. Therefore, the state's program, in order to be cost effective, must not be considered a taking. This paper assumes that there is a public use and there would be a valid exercise of eminent domain should the government offer compensation, and will therefore not engage in a discussion of those issues. Clearly, the least adversarial way for the government to achieve its goal of shore protection would be to bargain for easements or offer compensation, but this paper is meant to engage in the intellectual exercise as to whether compensation is required when the government engages in this sort of action. Ultimately, after examining the issues below, there is no clear answer as to whether any of the theories would work or be accepted by the courts, so this paper will also discuss the merits of the government's action and the fact that it is too important to protecting the public to be hindered by requiring compensation for unhappy property owners.

³⁶ *Id.*

³⁷ These are the arguments that the owners made in suing the state for invading their property and placing sand dunes on them. See *Klumpp v. Borough of Avalon*, 997 A.2d 967, 970 (N.J. 2010); see also *Borough of Harvey Cedars v. Karan*, 40 A.3d 75 (N.J. Super. Ct. App. Div. 2012).

III. Federal Takings Caselaw in the Context of Physical Invasions and Pre-Lucas Takings

There is no clear formula to determine when takings must be compensated by the government.³⁸ The Fifth Amendment requires compensation for private owners when the government deprives them of their property.³⁹ The purpose of the takings clause is to prevent some people from bearing a burden that should be borne by the public as a whole.⁴⁰ There are several that distinguish situations where compensation is required when an owner loses property rights from situations where compensation is not required. Because the sand dune placement and maintenance involve several different areas of takings law, several different areas of the law must be examined.

A physical invasion occurs when the government enters property and prevents the owner from exercising his property rights. Among a property owner's general rights to his property include the right to use, the right to exclude, and the right to alienate. Several of those rights are injured after a physical invasion. Should this school of thought prevail, the state's case probably will not succeed as it must enter a private owner's property in order to construct a dune. It is also important to note that pre-*Lucas* caselaw did not establish a bright-line rule to determine when a taking occurred, particularly for regulatory takings. This question is important because many of the principles argued by the cases that do not discuss physical invasions are applicable to the hypothetical case of this paper.

In *Pennsylvania Coal v. Mahon*, the Court rejected a state law that prevented a property owner from mining under his property in way that would remove the support and cause

³⁸ Daniel J. Curtin, Jr., *Takings in the Land-Use Arena after Lucas and Dolan: How Far is Too Far in Exactions?*, in *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* 83, 83 (David L. Callies ed., 1996).

³⁹ U.S. CONST. amend. V.

⁴⁰ Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, in *TAKINGS*, *supra* note 38, at 107, 107.

subsidence of the land.⁴¹ Justice Holmes made the important point that “some values are enjoyed under an implied limitation and must yield to police power.”⁴² The limitation must have its own limits, so the Court will consider the extent of diminution in value, but ultimately, each case is fact sensitive.⁴³ The Court laid out the vague standard that “the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”⁴⁴ In this case, there was a taking because there was no state interest that could justify the taking would warrant a taking because the regulation deprived the owner of the reason he purchased the property.⁴⁵ In opposition, Justice Brandeis would have upheld the government’s regulation and stated that one’s right to use his land is not unlimited and that “he may not use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare.”⁴⁶

Penn Central, one of the leading takings cases that set the Court on a path to developing a clearer standard, concerned a New York City law designed to protect historic landmarks.⁴⁷ The law ultimately prevented the owner of Grand Central Station from his property above the existing structure.⁴⁸ The city’s said the statute was necessary because:

The city acted from the conviction that “the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government” would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205–1.0(a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e. g.*, fostering “civic pride in the beauty and noble accomplishments of the past”; protecting and enhancing “the city’s attractions to

⁴¹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412-13 (1922).

⁴² *Id.* at 413.

⁴³ *Id.*

⁴⁴ *Id.* at 415

⁴⁵ *Id.* at 414

⁴⁶ *Id.* at 417 (Brandeis, J., dissenting).

⁴⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108 (1978). The law in question was the Landmarks Preservation Law of 1965. See N.Y.C. ADMIN. CODE, CH. 8–A, § 205–1.0 *et seq.* (1976).

⁴⁸ *Penn. Central*, 438 U.S. at 115-16.

tourists and visitors”; “support[ing] and stimul[ating] business and industry”; “strengthen[ing] the economy of the city”; and promoting “the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.” § 205–1.0(b).⁴⁹

Additionally, the law requires the owner to preserve the character of the exterior and get the approval of Landmarks Preservation Commission to develop the site any further.⁵⁰

Penn Central, the owner of the terminal, wanted to enter into a lease agreement that would allow the lessee to develop an office building above the terminal.⁵¹ The proposal was rejected by the Commission, which determined that it would be injurious to the aesthetic integrity of the terminal.⁵² The owner filed an appeal from the Commission’s decision, claiming that his property was taken without just compensation.⁵³ Lower courts found in favor of the government, denying the owner’s claim.⁵⁴

In determining that there was no taking, the Court noted it is much easier to find taking when there is a physical invasion of property rather than when government regulations affect the ability of a landowner to maximize the benefits of his property.⁵⁵ It noted the impracticality of finding a taking every time a use was limited but where the owner still able to exercise his

⁴⁹ *Id.* at 109.

⁵⁰ *Id.* at 111-12. If a landowner wants to alter its landmark site, there are three different procedures that can be used. The first involves applying to the Commission for a “certificate of no effect on protected architectural features” which involves approval for the improvement on the grounds that the landmark’s features will not be changed. The second method allows the owner to apply for a certificate of “appropriateness” which is granted when the values of the proposed construction would not hinder protection of the landmark. Finally, the last method is seeking approval on the grounds of “insufficient return” which helps to ensure that the landmark does not impose economic hardship on the owner. *Id.*

⁵¹ *Id.* at 116.

⁵² *Id.* at 117.

⁵³ *Id.* at 119.

⁵⁴ *Penn. Central*, 438 U.S. at 119-22. The Appellate Division held that the restriction was necessary in order to protect the landmark and that the claim could only be proven by showing that the regulation deprived the owner of all beneficial use of the property. 377 N.Y.S.2d 20 (N.Y. App. Div. 1975). The New York Court of Appeals also rejected the owner’s claim because there was no transfer of control of property to the city, but rather, a restriction of the owner’s ability to exploit his property. Furthermore, that court said there was no denial of due process because the landmark was still economically viable because the same use that persisted for fifty years was still valid and they could still earn a reasonable return on their investment. 366 N.E.2d 1271 (N.Y. 1977).

⁵⁵ *Penn. Central*, 438 U.S. at 124.

reasonable expectations.⁵⁶ Moreover, there is not a taking when certain beneficial uses are prohibited, or when a current use is prohibited, as long as there are other beneficial uses available for the property.⁵⁷

Rather, in deciding whether a taking has occurred, the Court will focus on the character of the action and whether there was an interference with rights in the parcel as a whole.⁵⁸ Diminution in value alone does not affect a taking.⁵⁹ When there is no physical invasion, the Court will consider the interference in the context of the investment-backed expectations and whether compensation is necessary to sustain it, as required by *Pennsylvania Coal v. Mahon*, *supra*.⁶⁰ However, *Penn Central* appears to raise the standard of what is required to find a taking that justifies payment of compensation in the absence of a physical invasion from *Mahon*.

The Court, in *Kaiser Aetna*, elaborated on the standard when there is a physical invasion. In that case, the Hawaii landowner expanded a natural pond to create a private marina.⁶¹ The ponds in that area of Hawaii were traditionally privately owned.⁶² The subject, Kuapa Pond was Kaiser Aetna.⁶³ In its natural state, the pond filled and emptied along with the ocean tides,⁶⁴ but the owner made improvements that included bridges, walls, and dredging that increased the depth of the pond.⁶⁵ Marina lessees that lived in the community surrounding the pond paid fees that went toward maintaining the marina and providing security.⁶⁶ The marina was controlled by

⁵⁶ *Id.* at 125.

⁵⁷ *See id.* at 125-30. The Court cited *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887); and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) to provide examples of this proposition.

⁵⁸ *Penn. Central*, 438 U.S. at 130-31.

⁵⁹ *Id.* at 131 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

⁶⁰ *Id.* at 136. (citing *Pennsylvania Coal*, 260 U.S. at 413).

⁶¹ *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979).

⁶² *Id.* at 166.

⁶³ *Id.* at 167.

⁶⁴ *Id.* at 166.

⁶⁵ *Id.* at 168.

⁶⁶ *Id.*

Kaiser Aetna and was used only once for a commercial use.⁶⁷

The dispute arose with the Army Corps of Engineers, which maintained that the owner could not deny public access to the pond because it became the navigable water of the United States.⁶⁸ First, the Court held that the marina did constitute “navigable waters” under federal law and that the Corps could require public access, but that would not mean there was no taking.⁶⁹ The Court did find a taking, arguing that where the owner purchases a private pond, it would be illogical for the owner’s investment in improvements would cause it to lose an essential property right—the right to exclude.⁷⁰ The Court noted that usually government’s regulation and intrusion into navigable waters would not be a taking, but here, because the pond was not previously navigable and these waters were traditionally privately owned under Hawaii law, this case more appropriately fit into those of private landowners.⁷¹ Here, this was not a case of a loss of use due to a government regulation, but rather, the government was facilitating an actual physical invasion of the privately owned marina.⁷²

The next year, in *Agins v. City of Tiburon*, the Supreme Court established a two-prong test to determine whether there is a regulatory taking.⁷³ There is no taking if the regulation “substantially advances a legitimate state interest” and does not “deny an owner economically viable use of his land.”⁷⁴ In *Agins*, the city of Tiburon adjusted zoning ordinances that placed greater development restrictions on Agins’s property.⁷⁵ Ultimately, the Court held that the state interest in preventing the unnecessary conversion of open space land to urban uses was

⁶⁷ *Kaiser Aetna*, 444 U.S. at 168.

⁶⁸ *Id.*

⁶⁹ *Id.* at 174.

⁷⁰ *Id.* at 176.

⁷¹ *Id.* at 178-79.

⁷² *Id.* at 180.

⁷³ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

⁷⁴ *Id.*

⁷⁵ *Id.* at 257.

legitimate state interest, it was a proper exercise of police power, and finally, that it still allowed other uses and did not take away ownership.⁷⁶ This general test formed the foundation of the test that is still used by the Supreme Court today.⁷⁷ Though this framework was largely abrogated and expanded twenty-five years later in *Lingle*,⁷⁸ this case is still important because it outlines the “substantially advance” test that the court applied in several subsequent cases.

In *Loretto*, the Court announced its clearest standard for a physical taking. In that case, the Court determined whether a minor permanent invasion of an owner’s property constitutes a taking.⁷⁹ New York state law required landlords to permit cable television companies to install cable lines on property and ask only for reasonable compensation determined by the statute.⁸⁰ The Supreme Court rejected the New York Court of Appeals’ finding that the exercise was justified under the police power as a legitimate public purpose that was within the state’s police power and held that there was a taking requiring compensation under the Fifth Amendment.⁸¹ The Court also noted that it did not matter what public interests were served, but rather, the Court focused on whether there was a frustration of property rights under *Penn Central, supra*.⁸² Here, the statute created a physical invasion, which is, no matter how small or minor, a taking, and thus, required compensation.⁸³ A permanent physical invasion is a *per se* taking⁸⁴ because the owner loses the right to exclude and the right to use the property, under *Loretto*.⁸⁵

Since *Loretto* there have been several takings cases, but it is important to address one

⁷⁶ *Id.* at 261-62.

⁷⁷ Curtin, *supra* note 38, at 84.

⁷⁸ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005). *Lingle* addressed whether courts should use the *Agins* “substantially advances” test. *Id.* at 540-41. The court determined that the “substantially advances” test is derived from due process analysis and not a takings analysis. *Id.* There is no connection between whether a government action substantially advances a legitimate state interest and whether someone has lost their property. *Id.* at 543.

⁷⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

⁸⁰ *Id.* at 423-24.

⁸¹ *Id.* at 425-26.

⁸² *Id.*

⁸³ *Id.* at 427.

⁸⁴ *Id.* at 432.

⁸⁵ *See Loretto*, 458 U.S. at 435-36.

more in this section because it deals with the *Agins* substantial advancement test. In Hawaii, Chevron entered into leases where it would lease gas stations to individual lessees and would require rent and a supply contract.⁸⁶ Hawaii enacted legislation that prohibited the amount of rent that Chevron would be allowed to charge its lessees.⁸⁷ The lower court struck down the statute, holding that it failed to “substantially advance a legitimate state interest” under *Agins*, arguing that it would not create any savings for consumers.⁸⁸ The decision was upheld by the Ninth Circuit.⁸⁹ Justice O’Connor, before addressing *Agins*, noted that the common theme throughout takings jurisprudence, as declared by *Penn Central*, *Loretto*, and *Lucas*, *infra*, is that

“[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.”⁹⁰

Finding that the “substantially advances” test does not fit into this mold, Justice O’Connor rejected it as a valid test within a takings analysis.⁹¹ The Court believed that this test fit better in the due process analysis from which it was originally derived—that it was best used to determine whether there was a proper interference in property rights or there was an arbitrary government action.⁹² The problem with the “substantially advances” formula was that it suggested that a regulation was valid if it achieved a legitimate public purpose, but that was not the proper consideration in determining whether private property was “taken” in violation of the Fifth

⁸⁶ *Lingle*, 544 U.S. at 532-33.

⁸⁷ *Id.* at 533.

⁸⁸ *Id.* at 534 (quoting *Chevron U.S.A. Inc. v. Cayetano*, 57 F.Supp.2d 1003, 1014 (D.Haw. 1998)).

⁸⁹ *Chevron U.S.A. Inc. v. Cayetano*, 224 F.3d 1030, 1033-37 (9th Cir. 2000).

⁹⁰ *Lingle*, 544 U.S. at 539.

⁹¹ *Id.* at 540.

⁹² *Id.* at 540-43 (citing *Nectow v. Cambridge*, 277 U.S. 183, 185 (1928) (zoning ordinance “deprived him of his property without due process of law”); *Euclid*, 272 U.S. at 395).

Amendment.⁹³

As Justice Blackmun points out, “there is no set formula to determine where a regulation ends and a taking begins.”⁹⁴ This principle has been consistent throughout takings caselaw.⁹⁵ And as Justice Blackmun argues⁹⁶ it is strange that the court would set a rigid rule for a category of *per se* takings while denouncing any formula for determining whether a taking has occurred. While *Lucas, infra*, also establishes a standard for a category of *per se* takings, the Court’s dislike for any clear standard is ultimately the better practice. Unless the Court is willing to establish a standard with exceptions (thus weakening the standard itself), the reality is there will be cases that will be permanent physical invasions that really should not warrant compensation.

Consider the Blue Line projects. These projects are designed to call attention to the potential effects of continued global warming and point out the amount of property damage (not dissimilar to the sand dune problem posed in this paper) that would occur as a result of a failure to take preventive measures.⁹⁷ The Blue Line projects involve painting blue lines and beacons on the ground to illustrate how far sea levels could rise.⁹⁸ But placing them on private property after *Loretto* presents a problem.⁹⁹ One possible solution to get around *Loretto* would be to require them as an exaction on future development¹⁰⁰, but this would probably not be effective on properties that have already been developed and no longer require permits; a similar problem

⁹³ *Id.* at 542.

⁹⁴ *Loretto*, 458 U.S. at 442 (Blackmun, J., dissenting (quoting *Goldblatt*, 369 U.S. at 594 (1962))).

⁹⁵ *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 77 (1913); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 183 (1958) (“The question whether there has been a taking cannot of course be resolved by general formulae, but must turn on the circumstances of each particular case.”); *Penn Central*, 438 U.S. at 124; *Kaiser Aetna*, 444 U.S. at 175; *Agins*, 447 U.S. at 260; *Loretto*, 458 U.S. at 426; *Lucas*, 505 U.S. 1003, 1015 (1992); see *U.S. v. Causby*, 328 United States 256, 274-75 (1946); see also *Armstrong v. United States*, 364 U.S. 40, 48 (1960). The total list of cases that have either explicitly stated this principle or alluded to it is too numerous to mention here.

⁹⁶ *Loretto*, 458 U.S. at 442-43.

⁹⁷ See generally, Marc R. Poirier, *A Very Clear Blue Line: Behavioral Economic, Public Choice, Public Art and Sea Level Rise*, 16 SOUTHEASTERN ENVTL. L.J. 83 (2007).

⁹⁸ *Id.* at 98.

⁹⁹ *Id.* at 103-04.

¹⁰⁰ *Id.*

exists with the sand dune projects because many owners are no longer looking to further improve their property in the near future, and thus, there is no reason for them to give into the exaction.

Neither of these projects denies any substantial beneficial use of the owner's whole property. Houses may be constructed, pools installed, and property enjoyed. Other than the literal government entrance for construction, the beach dune projects appear to be closer to land use regulations, similar to those in *Palazzolo, infra*. There is still a right to use the land, (though admittedly not the portion on which the dune sits), there is no right to public access, and there is still a right to dispose of the property. There hardly seems to be a substantial burden imposed on the owner, as described by Justice O'Connor.

The public trust is another prime example of when a permanent physical invasion has been allowed, but there was no taking requiring compensation.¹⁰¹ Under the public trust doctrine, coastal areas are held in trust by the states, which hold the land for the benefit of all citizens, and any grants to private owners are made subject to the trust¹⁰², which of course opens Fifth Amendment questions. According to Archer et al., and discussed further below, the fact that the public trust doctrine is founded in common law principles preserves its use for regulation of privately owned property.¹⁰³ The public trust doctrine and installation of sand dunes are similar in one crucial way: they both only place a limit on the rights of the owner as they pertain only to a portion of his property.

In fact, the beach dune problem appears to be more like the alleged taking in *Penn*

¹⁰¹ See *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005). In that case, the private owner was required to grant a public easement across its property so the public could access the public beaches. There was no other point of access. No compensation was required and the case was determined on the grounds that the public had a right to access the beach, and that the interest of the private owner must cave to the public's interest. This case is important here because there is a similar substantial public interest in building in maintaining sand dunes. Again, the public trust doctrine is another example where courts have found that there is not a substantial burden imposed on the owner's rights.

¹⁰² JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND MANAGEMENT OF AMERICA'S COASTS* 3-4 (1994).

¹⁰³ *Id.* at 78.

Central than it does to the taking in *Kaiser Aetna*, as the owner is not completely divested of any property rights. The owner was effectively deprived most of the use of airspace above his property, but that did not stop the Court from denying the takings claim—the owner was not so burdened that he could not benefit use his property as a whole or satisfy some of his investment-backed expectations. The same is true in the present hypothetical case. By focusing on the burden imposed, as suggested in *Lingle*, it can hardly be said that the physical invasion would frustrate the private owners’ investment. It is possible that there can be some costs to the owner associated with the government action, but, on grounds further elaborated below, that does not justify a requirement of compensation.

IV. *Lucas, Palazzolo*, and Background Principles

Not only do *Lucas* and *Palazzolo* deal with coastal regulations, there are also several other similarities between those cases and the hypothetical problem posed in this paper. As will be discussed in greater detail below, the character of the restriction more closely resembles the problem here.

A. *Lucas* and *Palazzolo*

The other form of categorical *per se* takings was established in *Lucas*. In that case, South Carolina imposed regulations that prevented Lucas from developing two beach front lots.¹⁰⁴ When he purchased them, the lots were not subject to permit requirements, but the Beach Management Act, which was adopted after the property was acquired, restricted development.¹⁰⁵ Justice Scalia listed the two types of categorical takings: where there is a “physical occupation of property” and where the owner loses “all economically beneficial or productive use of land.”¹⁰⁶ The Court noted what has come to be known as the “denominator problem” in which the Court

¹⁰⁴ *Lucas*, 505 U.S. at 1008-09.

¹⁰⁵ *Id.* at 1008.

¹⁰⁶ *Id.* at 1015.

does not say whether the loss should be considered in light of the burdened parcel of property only or in the context of the entire property.¹⁰⁷ It did say, however, that the question should be answered based on “how the owner’s reasonable expectations have been shaped by the State’s law of property.”¹⁰⁸ This second form of categorical takings was justified on the grounds that total deprivation of beneficial amounts to the equivalent of a physical invasion.¹⁰⁹

However, the *Lucas* opinion is also noteworthy for an exception it adds to the analysis. Deprivation of all economic use does not require compensation where “inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”¹¹⁰ When he purchases property, an owner should naturally expect that there will be limits to his use, and those limits will be valid exercises of state police power.¹¹¹ Justice Scalia’s language includes the principle that an owner cannot receive compensation on a theory of takings where there is a prior restraint restriction on use imposed either by statute or state common law on nuisance and property.¹¹² These restrictions, which eliminate some takings claims, must be founded on background principles of property law that would impose the same restriction on the property as the regulation or action being challenged.¹¹³ New legislation is insufficient to prevent a taking if the restriction is not inherent in the title itself and the state’s background principles of law.¹¹⁴ Justice Scalia focused on nuisance as the primary source for background principles of state law.¹¹⁵ This holding has created a threshold issue: if the right lost was already one that was prohibited when the owner purchased the property and not included in the property “bundle of

¹⁰⁷ *Id.* at 1016 n.7.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1017.

¹¹⁰ *Lucas*, 505 U.S. at 1027.

¹¹¹ *Id.*

¹¹² Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARVARD ENVTL. L. REV. 321, 322 (2005).

¹¹³ *Lucas*, 505 U.S. at 1028-29.

¹¹⁴ *Id.* at 1029.

¹¹⁵ *See, id.* at 1029-30.

sticks,” there cannot possibly be a takings claim.¹¹⁶

Rather than the strict interpretation of “background principles” that Justice Scalia’s majority opinion espouses, other members of the Court would have relaxed the definition. Justice Kennedy would have focused on the owner’s reasonable expectations.¹¹⁷ According to him, the owners’ expectations are shaped by what courts deem to be valid government actions, and those rights are protected by Constitutional rules and customs.¹¹⁸ To Justice Kennedy, the restriction to nuisance is too narrow, and the definition must be broadened to include legal tradition so that a state can enact new regulations in response to changing conditions.¹¹⁹ Justice Stevens lamented the Court’s decision, stating that it “freezes the State’s common law, denying the legislature of its traditional power to revise the law governing the rights and uses of property.”¹²⁰ He argued, similar to Justice Kennedy, that changing circumstances justify departures from common law that should not justify compensation.¹²¹

Initially, *Lucas* was thought to carve out additional avenues for compensation other than the challenging one created by *Penn Central*.¹²² But the *Lucas* opinion has been interpreted narrowly and literally as demonstrated by *Palazzolo* which stated that a 93.7% drop in value was not sufficient to satisfy *Lucas*’s total loss of “economically beneficial use” test.¹²³ In dicta, the Court addressed the denominator problem described above by treating the loss as a portion of the whole property and not finding a total loss for a portion of the property.¹²⁴

By the time the Court decided *Palazzolo* most states had decided that background

¹¹⁶ Blumm, *supra* note 112, at 326.

¹¹⁷ *Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1035 (Kennedy, J., concurring).

¹²⁰ *Id.* at 1068-69 (Stevens, J., dissenting).

¹²¹ *Id.* at 1070 (Stevens, J., dissenting).

¹²² Blumm & Ritchie, *supra* note 112, at 325.

¹²³ *Id.* at 325 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001)).

¹²⁴ *Palazzolo*, 533 U.S. at 631.

principles included statutes adopted before the current owner purchased the property.¹²⁵ With Justice Kennedy writing for the majority, the Court upheld the *Lucas* total takings standard, but cut a middle ground between Justice Scalia’s interpretation of “background principles and many states’ definitions. In this case, the petitioner owned about 20 acres of land along the Connecticut shoreline, much of which was salt marsh, which he wanted to fill in for development.¹²⁶ The Rhode Island Coastal Resources Management Program, which is charged with regulating coastal areas, designated the marshes on Palazzolo’s property as protected.¹²⁷ After several attempts, Palazzolo’s 1985 submission was finally rejected because, as the Council noted, the proposal would conflict with the Management Plan and denied the application.¹²⁸ Palazzolo filed a claim alleging the plan caused in a taking that deprived him of all economically beneficial use of his land.¹²⁹ The Court held that Palazzolo did not satisfy the *Lucas* requirements because portions of the property could still be improved in compliance with the state’s management plan.¹³⁰ It also noted that the ability to build a “substantial residence on the 18-acre property was more than a token interest that would leave the property “economically idle” under *Lucas*.¹³¹

The Court rejected the states’ interpretation that a preexisting statute, *per se*, defeats a takings challenge.¹³² Passage of title does not transform what would be a taking into permanent loss of a property right, nor does a statute become a background principle merely be

¹²⁵ Blumm & Ritchie, *supra* note 112, at 355.

¹²⁶ *Palazzolo*, 533 U.S. at 613-14.

¹²⁷ *Id.* at 614.

¹²⁸ *Id.* 1971 R.I. Pub. Laws, ch. 279 § 1 et seq. established the Council, and § 210.3, as amended June 28, 1983, designated the land as protected.

¹²⁹ *Id.* at 616.

¹³⁰ *Id.* at 630-31.

¹³¹ *Id.* at 631-32. In determining whether the Court could find a taking of a portion of the entire property, the Court considered several standards. Petitioner argued that he owned two distinct properties and that one was entirely taken. The Court was skeptical of this claim and contemplated considering the extent of the deprivation against the value of the property as a whole suggested by *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 497 (1987). The Court took a skeptical view of this rule in *Lucas*. 505 U.S. at 1016-17. Ultimately the Court did not reach a final decision on this issue because the case came to it on the premise that the entire property served as the basis for the taking.

¹³² Blumm & Ritchie, *supra* note 112, at 356 (citing *Palazzolo*, 533 U.S. 630).

enactment.¹³³ However, Justice Kennedy did leave open the door for inclusion of some, but not all statutes, that existed prior to the current owner's purchase of the land.¹³⁴ Generally, a statute becomes a background principle where the type use of the property has traditionally been subject to regulation.¹³⁵ The success of takings claims will vary, therefore, based on the particular property rights recognized in each state and the specific statute in question.

These principles should govern whether sand dune projects constitute compensable takings. The circumstances of the cases decided by the Court most closely resemble the problem here. Moreover, the burdens on the property, as considered by Justice O'Connor in *Lingle*, are certainly not as heavy. On its face, it looks like a physical invasion (thus why a court may refrain from looking further), but a closer look suggests that this is more like a regulation. First, other than the placement of the dune, this scheme appears to be very similar to that of *Palazzolo*, in that it is a land use regulation, and that owners are prevented from doing anything with the small portion of the land, they cannot build on it, they may still fully utilize the remainder of their property, and they haven't lost the right to exclude, except for allowing the government to enter for periodic maintenance. They may still make beneficial use of their property under *Penn Central*. There is a statutory scheme in place that would suggest these properties would be regulated, which should affect the owner's expectations. Furthermore, the government has been routinely asked to preserve property and act for the benefit of the community when its interests clash with those of private owners, as discussed by the nuisance cases below and thus, this sort of action would qualify as a background principle of state law.

While *Loretto* serves as precedent and the principle that the courts may grant compensation based on the theory that there has been a total taking (deprivation of economically

¹³³ *Palazzolo*, 533 U.S. at 630.

¹³⁴ *Id.*

¹³⁵ Blumm & Ritchie, *supra* note 112, at 357.

beneficial use) of a portion of the property, however, the trend seems to be in favor of Palazzolo for this type of action; the courts appear uneasy to grant compensation where the government's purpose is environmental and property protection. Moreover, these cases are not like *Loretto* because there is no government action that provides benefits for a narrow number of actors and there is no forcing the owners to allow other private actors entry to their property. Additionally, the placement of dunes does not have a negative impact on the remainder of the property and there is no conferral of a benefit on a private third party.

B. Application of the Background Principles Theory

Some states have interpreted the term “background principles” broadly, at the suggestion of Justice Kennedy’s concurring opinion in *Lucas*, to incorporate statutory definitions of nuisance;¹³⁶ and despite the majority’s sometimes rigid preference, the general pattern has been to follow the principle that property rights are evolving, a principle proffered by Justice Kennedy’s opinion and Justice Stevens in his dissent, in which he states that property rules are not frozen in time and unevolving and specifically cites the a number of environmental protection statutes, including the Coastal Zone Management Act as examples.¹³⁷ In some cases, the Court has declined to address situations where some of the Justices feel the statute was wrongly interpreted as a background principle by the state simply because it was adopted before

¹³⁶ Blumm & Ritchie, *supra* note 112, at 334; *see generally*, cases cited herein. Blumm and Ritchie also cite *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997), stating that in identifying the background principles that should be applied, the court should also look at the statutes in effect when the owner obtained the property; *Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), holding that a statute protecting archaeological burial sites constituted a background principle; *Colorado Dep’t of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), which held that restrictions on uranium disposal did not constitute a taking because state common law nuisance did not allow the spread of radioactive material; *Hendler v. United States*, 38 Fed. Cl. 611 (1997), *aff’d*, 175 F.3d 1374 (Fed. Cir. 1999), holding the government installation of wells to monitor groundwater contamination was not a taking because the California code defined contamination as a public nuisance; and *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001), which held that the city’s mandatory closure of a hotel was not a taking because “drug and nuisance activity had become ‘inextricably intertwined’ with the hotel’s operation.”

¹³⁷ Blumm & Ritchie, *supra* note 112, at 338 (citing *Lucas*, 505 U.S. at 1068-70 (Stevens, J., dissenting)); *see also Lucas* 505 U.S. at 1031.

the current owner purchased the property.¹³⁸ But the Court does unequivocally say in *Stop the Beach Renourishment v. Florida* that “The Takings Clause only protects property rights as they are established under state law.”¹³⁹

In *Stop the Beach Renourishment*, the Supreme Court applied takings law to the beach protection plans.¹⁴⁰ In Florida, the state owns, in a public trust, the land seaward of the mean high-tide line; everything above the line is owned privately.¹⁴¹ In Florida, private owners have property rights that include the right of access to the water, right to an unobstructed view, and the right to change property size if the mean high-tide line should move.¹⁴² If there is a sudden change that adds land to the shore, the additional land is owned by the state and not the property owner, even though the mean high-tide line might change.¹⁴³ If there are additional accretions that follow an avulsion, the private owner no longer has rights to additional land.¹⁴⁴ Florida constructed a scheme by which it replenished beaches destroyed by hurricanes and thus fixed the high-tide line as the “erosion control line” thereby fixing the border between the state’s property and private property.¹⁴⁵

A municipality and a county jointly submitted a plan that would add 75 feet of sand (by dredging) seaward of the erosion control line.¹⁴⁶ The petitioner, a corporation formed by property owners along the shoreline, alleged an unconstitutional taking occurred because it lost two rights:

¹³⁸ Blumm & Ritchie, *supra* note 112, at 348-49 (citing *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (cert. denied (Scalia, J., dissenting from denial of certiorari)))

¹³⁹ *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.* 130 S. Ct. 2592, 2612 (2010).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2598. The change in high-tide line is known as an accretion, where additional land is added to the beach that lowers the line, and the change must occur gradually so that it is only evident over a large period of time. An avulsion occurs when there is a sudden change (either a gain or loss of land).

¹⁴² *Id.*

¹⁴³ *Id.* at 2599.

¹⁴⁴ *Id.*

¹⁴⁵ *Stop the Beach Renourishment*, 130 S. Ct. at 2599.

¹⁴⁶ *Id.* at 2600.

the right to accretions and the right to have their property contact the water.¹⁴⁷ The Florida Supreme Court held that the doctrine of avulsion applied and thus, the rights of the owners “were not implicated by the beach-restoration project.”¹⁴⁸ The Court began its takings analysis by listing the various ways in which a taking can occur, but particularly mentioned that it is unconstitutional for a state to “recharacterize as public property what was previously private property.”¹⁴⁹ The Court ultimately applied state law in determining that state had the right to do what it wanted with its own land; it was within its own rights as a property owner to expose new land that was held into the public trust.¹⁵⁰ Furthermore, since the private owners had no rights to the lands exposed by avulsions, their rights to accretions were necessarily subject to the state’s right to fill in the land; it did not matter that the state caused the avulsion, as opposed to it occurring naturally.¹⁵¹ Thus the Court found the Florida’s application of the background principles to be proper and upheld the judgment.¹⁵²

Several states apply the background principles theory to the public trust doctrine and have held that private owners cannot have any reasonable investment-backed expectations for the use of their property that are inconsistent with the purposes for which the state holds the land in trust.¹⁵³ The Mississippi Supreme Court has held that construction blocking an adjacent owner’s access to the water does not constitute a public taking, stating, “the rights of riparian owners are subject to the prior right of the state to impose an additional public use upon lands without requiring the payment of additional compensation.”¹⁵⁴ A similar decision in Washington State

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing *Walton Cnty. v. Stop Beach Renourishment, Inc.*, 998 So.2d 1102, 1116-18 (Fla. 2008)).

¹⁴⁹ *Id.* at 2601.

¹⁵⁰ *Id.* at 2611.

¹⁵¹ *Stop the Beach Renourishment*, 130 S. Ct. at 2611-12.

¹⁵² *Id.* at 2612.

¹⁵³ ARCHER ET AL., *supra* note 102, at 78.

¹⁵⁴ *Xidis v. City of Gulfport*, 72 So.2d 153 (Miss. 1954).

held that property purchased along the coast was purchased subject to the public trust doctrine.¹⁵⁵

States have generally recognized these principles when dealing with dune and beach protection and replenishment. The Virginia Supreme Court followed *Lucas's* principle that not all categorical takings are compensable.¹⁵⁶ To be compensated an owner must first have possessed a property right where the state is affecting a right contained in the bundle when the owner acquired the property.¹⁵⁷ The ordinance barring the removal of sand dunes in that case existed before the plaintiff acquired his beachfront property.¹⁵⁸ Since the plaintiff never had the property right, the city could not have taken it away.¹⁵⁹ A statutory prohibition is permissible to remove a right from the bundle before acquisition, and the *Bell* case differed from *Lucas* because there¹⁶⁰, since the owner acquired the property before the regulation was adopted, the state would have to show common law principles of nuisance would have prohibited the use; that was not necessary in *Bell* because the regulation came first.¹⁶¹

In *Just v. Marinette County*, the Wisconsin Supreme court denied a takings claim when the county refused to grant a permit to fill in wetlands on the grounds that the state may permissibly restrict development on the shoreline in a way that changes the character of the shoreline.¹⁶² The purpose of the regulation is to ensure the navigable waters and coast are not destroyed due to uncontrolled use of the shorelands.¹⁶³ The Justs owned wetlands that they wanted to fill in and develop.¹⁶⁴ The court ruled that an owner's rights over his land are not unlimited and it is reasonable, in the interest of protecting the public, "[to limit] the use of

¹⁵⁵ *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987).

¹⁵⁶ *City of Virginia Beach v. Bell*, 498 S.E.2d 414 (Va.1998).

¹⁵⁷ *Id.* at 400 (citing *Lucas*, 505 U.S. at 1027).

¹⁵⁸ *Id.* at 401.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 401-02.

¹⁶¹ *Id.* at 401.

¹⁶² *Just v. Marinette Cnty.*, 201 N.W.2d 761 (Wis. 1972).

¹⁶³ *Id.* at 764.

¹⁶⁴ *Id.* at 766.

private property to its natural uses.”¹⁶⁵ The court recognized a public right to maintain the natural character of the shore area.¹⁶⁶

V. New Jersey Background Principles

The application of the background principles of state law is relatively straightforward. How the court solves the denominator problem will make a difference here. If it takes the same approach as the Court in *Palazzolo* and state that there is only a partial taking of the whole property, the analysis will have already ended because there is no denying that the owners can make beneficial use of the remainder of the property by building a house, for example. However, if the hypothetical court solves the denominator problem the other way, by finding a total taking of a portion of the property, then the analysis must continue. First, there must first be a determination of which principles constitute important facets of property law relevant here. Second, they must be applied in a manner consistent with *Lucas* and *Palazzolo*.

In *Pace Resources v. Shrewsbury Township*, the Third Circuit held that there was no taking if there was still an economically viable use for the land.¹⁶⁷ In *Pace*, residents of Shrewsbury were worried about industrial development, resulting in downzoning which prevented the plaintiff from completing construction of its industrial park. The court stated that statutes may frustrate certain reasonable investment-back expectations. Furthermore, expectations are only reasonable “if they take into account the power of the state to regulate in the public interest.”¹⁶⁸ Subsequent cases have interpreted *Pace* to stand for the principle that reasonable expectations are frustrated only where a regulation has the same effect as the

¹⁶⁵ *Id.* at 768.

¹⁶⁶ *Id.* at 771.

¹⁶⁷ *Pace Resources v. Shrewsbury Twp.*, 808 F.2d 1023, 1033 (3rd Cir. 1987).

¹⁶⁸ *Id.*

destruction of a property right.¹⁶⁹

The New Jersey Supreme Court already settled on the total takings analysis before the United States Supreme Court announced a similar analysis in *Lucas*. In *Gardner*, there was a challenge to an ordinance that restricted future development of residences and limited other property to agricultural and related uses.¹⁷⁰ The restriction was imposed by the state's statute intended to preserve the Pinelands.¹⁷¹ The court found that the statute protected public health and safety by preventing large numbers of development projects on environmentally-sensitive land.¹⁷² "Diminution of value itself does not constitute a taking," the court noted and stated that a regulatory scheme is valid unless it "denies all practical use of property."¹⁷³ The court focuses on the economically viable uses allowed under the statute.¹⁷⁴ A focus on difference in market value is not effective because it is "conjecturable and unmeasurable."¹⁷⁵ Therefore, since there was still economically beneficial use, there was no compensation required.¹⁷⁶

Gardner illustrates the facets of New Jersey takings law, which sets out a similar standard to *Lucas* and reinforced by *Lingle*¹⁷⁷ that there must be a total taking. That thread is constant throughout New Jersey takings law. It is also recognized that owners must expect their rights to be limited by some regulations or restrictions and that they will not have unlimited use.

¹⁶⁹ Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, in TAKINGS, *supra* note 38, at 119, 132.

¹⁷⁰ *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 253 (N.J. 1991).

¹⁷¹ *Id.* at 253-55.

¹⁷² *Id.* at 258-59.

¹⁷³ *Id.* at 259-60. (citing *Euclid*, 272 U.S. at 365, and *Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n*, 486 A.2d 330, 332 (N.J. 1985)).

¹⁷⁴ *Gardner*, 593 A.2d at 260 (citing *In re Egg Harbor Assocs.*, 464 A.2d 1115 (N.J. 1983); *Spiegle v. Borough of Beach Haven*, 218 A.2d 129 (N.J. 1966); *certif. denied*, 385 U.S. 831 (1966)).

¹⁷⁵ *Id.* at 262.

¹⁷⁶ *Id.*

¹⁷⁷ In *Mansoldo v. State*, 898 A.2d 1018 (N.J. 2006), the court incorporated the *Lingle* standard, holding, "considerations of "legitimate state interest[s]" have no bearing on whether the DEP regulation effected a taking or what compensation is due. Rather, the cornerstone inquiry in this circumstance is whether the [regulation] denies 'all economically beneficial or productive use of [the] land' [under *Lucas*]" (citations omitted).

A. Public Trust

Indeed, states often believe that they have an interest in controlling shoreline erosion.¹⁷⁸ One purpose, recognized by states that have stronger public trust doctrines, such as California and New Jersey, view shore maintenance and development restrictions as necessary to protecting property and preserving beach areas.¹⁷⁹ In Florida, local governments may establish zoning and building restrictions that protect beaches and barrier dunes.¹⁸⁰ It is also generally recognized that states may use their police power to regulate private lands. The New Jersey Supreme Court has repeatedly determined that, where necessary, the public must be granted an easement across private property so that it may access the publicly held beaches.¹⁸¹ Among those opinions is acceptance of the notion that there is limited public beach and that since it is so limited and so valuable, it is crucial that the courts carve out a right for the public to have access.

It is clear that the public trust doctrine is a well-engrained part of New Jersey property law and should be treated as a background principle. In those cases, there is no requirement of compensation for the fact that private owners must allow others access to their property so they may reach the foreshore and water. In those cases, there is arguable a greater loss to the private owners than in the sand dune cases. Under the public trust, the landowners lose their right to exclude, a right that has typically been held to be a crucial stick in the bundle of property rights. In the dune cases, the owners' right to exclude is only slightly limited—they must only allow one other entity onto their property, the state, and the right is not limited, as the state may only enter to maintain the dunes. Based on the unique nature of beachfront property, a reasonable owner, it

¹⁷⁸ ARCHER ET AL., *surpa* note 102 at 109.

¹⁷⁹ *Id.* at 110.

¹⁸⁰ *Id.* at 111, citing Fla. Stat. Ann. § 161.053 (West Supp. 1989).

¹⁸¹ *See* Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978); *see also* Raleigh, 185 N.J. 40 (N.J. 2005); Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355 (N.J. 1984); Lusardi v. Curtis Point Prop. Owners Assoc., 430 A.2d 881 (N.J. 1981); Hyland v. Borough of Allenhurst, 393 A.2d 579 (1978).

can be argued, could not have expected that he would possess an unlimited right to exclude. It is well-founded in New Jersey courts that the public has an interest in that small portion of land that is directly adjacent to the beach and privately owned. A similar theory should be imposed with relation to the placement of sand dunes.

Generally, there is a significant amount of discussion among the cases cited above that the market value of the property will decline as a result of the government action, but that is never the primary consideration. After all, the Court has not always required compensation for the government's action. One possible reason for doing so would be that the market does not always accurately reflect the specific rights that an owner may or may not have over his property. The market will always be more sensitive to certain rights than others, but the Court has not decided a taking occurred or did not occur because the loss was or was not reflected in market value (unless, of course, all value is eliminated). Here, it is unlikely that the possibility the owner will lose right to exclude to a public easement will have a significant effect on value, but the loss of view (discussed further below), which is not a crucial property right, will likely be reflected in market value. Surely, this is not the proper way to determine whether there is a compensable taking. Rather, the courts should focus on whether the owner had a reasonable expectation that he had the right. If not, there should be no compensation.

B. Nuisance

Prohibitions on nuisances are well established by the United States Supreme Court and are explicitly recognized in *Lucas* and *Palazzolo* as background principles. In *Miller v. Schoene*, the state required the plaintiffs to cut down their cedar trees in order to prevent the communication of plant disease to apple orchards that were nearby.¹⁸² The statute under which the state was acting did not grant compensation for the value of the trees or decrease in market

¹⁸² *Miller v. Schoene*, 276 U.S. 272, 277 (1928).

value of the property without the trees.¹⁸³ The statute declared that infected trees within a certain distance of an apple orchard to be a public nuisance and subject to destruction.¹⁸⁴ Trees affected by a disease known as cedar rust could transfer the disease to apple trees within a two mile radius and the only practical means of preventing the spread was by cutting the trees down.¹⁸⁵ The Court noted that the value of the apple trees and their fruits was far greater than that of the cedar trees, which had no noteworthy substantial value.¹⁸⁶ The Court held that where the state is forced to choose between preservation of one class of property at the expense of another, it may choose to destroy the less valued property in order to save the one that is of greater public value.¹⁸⁷ The courts should prefer the public interest over private property interests as a valid exercise of police power.¹⁸⁸

In *Goldblatt*, Hempstead enacted an ordinance regulating excavating within its city limits, which effectively prevented the plaintiff from operating its business.¹⁸⁹ The town expanded around the plaintiff's mine, after it had largely been excavated, so that there were now many people living around it.¹⁹⁰ In determining whether the town's action was a valid exercise of police power, the Court would not consider whether the best economic use is prohibited.¹⁹¹ The Court instead will consider whether the regulation promotes the public interest and leaves the owner with other lawful uses for the property.¹⁹² Ultimately, the Court held that since the

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 278.

¹⁸⁵ *Id.* at 278-79.

¹⁸⁶ *Id.* at 279.

¹⁸⁷ *Id.*

¹⁸⁸ *Miller*, 276 U.S. at 280.

¹⁸⁹ *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 590-91 (1962).

¹⁹⁰ *Id.* at 591.

¹⁹¹ *Id.* at 592.

¹⁹² *Id.* at 593. The Court cited *Mugler*, which states, "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is

plaintiffs could not show that the ordinance and its goals were unreasonable, the presumption of a valid exercise of police power remains.¹⁹³

New Jersey courts have similarly applied the takings principles listed above. In *Usdin* the Court held that where the state's Department of Environmental Protection regulations prevented landowners from developing land was aimed at preventing injury or property loss of the plaintiff or his neighbors due to flooding, there was not a taking, but rather a prevention of the misuse of nature.¹⁹⁴ The court applied the rule enunciated in *A.M.G. Associates v. Springfield Tp.*¹⁹⁵ which stated that a zoning ordinance that effectively prohibited beneficial development on a small portion of the plaintiff's land was not a taking because the plaintiff still had a large portion of his property to use as he wished.¹⁹⁶ The Court also applied the holding in *Just, supra* and found Justice Brandeis's dissent in *Pennsylvania Coal* particularly helpful.¹⁹⁷ Brandeis's dissent was based on the opinion in *Mugler* and argued that the primary consideration should be whether the government action is designed to protect public health, not whether it is seeking to devote private property for public use.¹⁹⁸

In *Bernardsville Quarry*, another *Lucas* era case, the New Jersey Supreme Court upheld an ordinance that limited the depth of quarry operations.¹⁹⁹ In denying a permit to dig deeper and for other quarry-related activities, the municipality cited health, safety, and environmental concerns.²⁰⁰ The court recognized that municipalities have the general police power to regulate. In upholding the ordinance, the court relied on *Keystone* which stated that regulations of this type

only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." 123 U.S. at 668-69 (1887).

¹⁹³ *Goldblatt*, 369 U.S. at 595-96.

¹⁹⁴ *Usdin v. State*, 414 A.2d 280 (N.J. Super. Ct. Law Div. 1980).

¹⁹⁵ 319 A.2d 705 (N.J. 1974); *see also Id.* at n.4.

¹⁹⁶ *Usdin*, 414 A.2d at 286-87.

¹⁹⁷ *Id.* at 288-89.

¹⁹⁸ *Id.* at 284; *see also Mugler*, 123 U.S. at 668-69.

¹⁹⁹ *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992).

²⁰⁰ *Id.* at 1379.

of activity are valid if they legitimately established to protect the “public interest in health, the environment, and the fiscal integrity of the area.”²⁰¹ The court determined that the legislature reasonably came to the conclusion that the regulation was necessary to preventing the harm.²⁰² The court applied the *Lucas* test in *Bernardsville Quarry* and held there was no compensation necessary where the property could be put to other valuable use.²⁰³

Bernardsville Quarry recognized that a taking can occur without compensation by stopping illegal or harmful activity.²⁰⁴ The public has an interest in preventing public nuisances and those takings do not require compensation.²⁰⁵ Where the risks of harm are substantial and the regulation is reasonably tailored to preventing that harm, there is a constitutional taking.²⁰⁶ In the dune cases, the lack of sand dunes can cause serious damage, as is evident as a result of Hurricane Sandy. The state has the ability to prevent harm to public property and may look at what is beneficial to the community under *Goldblatt*. The failure to allow dunes on their property constitutes a harmful and noxious use under *Mugler* and *Lucas* which must be fixed by the government. It is a common principle of takings law that the owner should expect he cannot use his property however he wants, and such an argument should be extended to sand dunes.

C. Lateral Support

Similarly, New Jersey has long recognized the right to lateral support. “Under the common law, a landowner who removes lateral support may be held liable for damage to improvements on an adjoining property.”²⁰⁷ Where the owner is not negligent, he must only

²⁰¹ *Id.* at 1383, (citing *Keystone*, 480 U.S. at 485-88).

²⁰² *Id.* at 1385-86.

²⁰³ *Id.* at 1388.

²⁰⁴ *Id.* at 1384-85.

²⁰⁵ *Bernardsville Quarry*, 608 A.2d at 1384-85 (citing *Keystone*, 480 U.S. at 492; *Mugler*, 123 U.S. 623; and *Miller v. Schoene*, 276 U.S. 272 (1928)); These cases also shaped the U.S. Supreme Court’s jurisprudence on nuisance law.)

²⁰⁶ *Bernardsville Quarry*, 608 A.2d at 1386.

²⁰⁷ *Schultz v. Byers*, 53 N.J.L. 442, 443 (N.J. 1891).

maintain support for neighboring land in its natural state.²⁰⁸

Traditionally, the lateral support doctrine is applied to owners on elevated property, requiring downhill owners to use reasonable care maintain support to prevent land from sliding down the hill, thereby destroying the uphill neighbor's property. While the doctrine has never been explicitly applied to flooding situations, the same principles should apply. Implicit in the argument for lateral support is that neighbors have a duty to each other to maintain their property in a way that avoids causing damage to their neighbor's. In that vein, the argument for lateral support is similar that of nuisance. By refusing to allow the state or municipality to build a sand dune on their property, the beachfront owners are putting their neighbors at risk, and there is nothing their neighbors can do about it.

The beachfront owners have the power to affect whether the inland owners' properties will be severely affected by floods, and they are the only ones who can prevent it. Just like one is not allowed to do anything that will cause his neighbor's land to slide downhill, he also should not be able to do anything that will cause his neighbor's property to flood. That is what is happening here; the beachfront owners are trying to stop a scheme that will prevent their neighbor's property from severe damage caused by flooding and storm surge. The government should be able to step in and construct dunes for that reason. Doing so would be for the owners to fulfill their duty to their neighbors and maintain their property in a way that avoids causing damage to a neighbor.

D. New Jersey Beach Cases

Owners of beachfront property have brought numerous cases against municipalities alleging that beach protection ordinances create compensatory takings. That was the case in *Spiegle*, where the plaintiffs owned four lots in Beach Haven and an ordinance used the state's

²⁰⁸ Pullan v. Stallman, 70 N.J.L. 10 (N.J. 1903).

police power to protect sand dunes.²⁰⁹ The plaintiffs alleged that the regulations were so strict that they would only be able to get minimal use from their land.²¹⁰ The court noted the difficulty in carving out a regulatory takings test to determine when compensation is required because the municipality is no longer lawfully acting within its police power.²¹¹ As this decision was made well before the Supreme Court's decision in *Lucas*, the court determined that there was no taking because the plaintiffs failed to show a viable economic use for the property that would not create a dangerous condition to both the shore and the structure itself.²¹²

New Jersey state laws also have a history of protecting sand dunes and beach areas. For example, Coastal Area Facility Review Act, originally enacted in 1973, was updated in 1993. The purpose was to allow the state to regulate development in the coastal area, but the original statute allowed small buildings to be constructed without much regulation. The updated statute now requires permits for all structures that will be built near the beach or the dunes, with less strict requirements for structures to be built farther away.²¹³

In *Seven Mile Island*, the Borough of Avalon adopted an ordinance that would protect its beaches and dunes after repeated storm damage.²¹⁴ In order to receive funds for beach protection from the state, Avalon may not allow construction of swimming pools in dune areas.²¹⁵ The court found the ordinance to be valid because it was a reasonable measure used to protect the beaches, an important interest, it said, because “the dunes are the island’s first line of defense against future damage.”²¹⁶ A similar case stated that any challenge to a municipal ordinance that protects

²⁰⁹ *Spiegle*, 218 A.2d. at 130-33 (1966).

²¹⁰ *Id.* at 135.

²¹¹ *Id.* at 136-37.

²¹² *Id.* at 137.

²¹³ *See generally*, Michael J. Gross & Jeffrey S. Beenstock, *Implications of the New CAFRA Legislation*, NEW JERSEY LAWYER THE MAGAZINE, (1995).

²¹⁴ *Seven Mile Island, LCC v. Borough of Avalon*, 2009 WL 1750422 at *1-2 (N.J. Super. Ct. App. Div. N.J. 2009).

²¹⁵ *Id.* at *2.

²¹⁶ *Id.* at *7.

dunes must show that the ordinance “unduly burdens the beneficial use of the land.”²¹⁷

The takings law regarding dune placement, reconstruction, and protection are not definitive in New Jersey. A taking has been found in state court where the placement of a dune on private property denies the owner of the property all use of their land.²¹⁸ In another case, *Klumpp*, the plaintiffs’ loss of property was deemed to be a total taking by regulation and physical invasion because their entire property had been incorporated into the beach construction scheme and was covered by sand dunes in a way that prevented them from constructing anything on their property.²¹⁹ The government action in these cases would satisfy the *Lucas* analysis that requires compensation where all economic uses is lost, but these cases do not address the more current actions that place sand dunes at the edge of property and still allow the construction of, in some cases, a substantial residence.

A focus on loss in value has been the focus in some cases.²²⁰ *Harvey Cedars v. Karan* focused on loss of view and awarded compensation for the loss, but that is an improper consideration. The right to a view has never been held to be an essential property right. The New Jersey Supreme Court has never decided whether a loss of view is compensable as a taking²²¹, but the arguments against are compelling. Primarily, there should be no compensation because there is no nexus between a permanent physical invasion and a loss of view²²². Owners that are

²¹⁷ *State v. Jedziniak*, 2009 WL 321550 (N.J. Super. Ct. App. Div. N.J. 2009).

²¹⁸ *Lorio v. City of Sea Isle*, 212 A.2d 802, 802-03 (N.J. Super. Ct. Law Div. 1965).

²¹⁹ *Klumpp*, 997 A.2d at 967.

²²⁰ *Harvey Cedars*, 40 A.3d at 75.

²²¹ However, the New Jersey Supreme Court has granted cert. and will likely decide the issue in the near future. *Borough of Harvey Cedars v. Karan*, 45 A.3d 983 (2012).

²²² There is no nexus because a permanent physical invasion can occur without a loss of view, i.e. the Blue Line projects. Furthermore, a loss of view can occur without a permanent physical invasion—if the state were to build a dune just on the other side of an owner’s property line, there may be a loss in view but would be no physical invasion (thus the permanent physical invasion analysis would not apply) and therefore, there would be no per se taking. Compensating for a loss in view should be wholly separate from whether a taking has occurred (perhaps a tort theory would apply, on a loss in market value argument, assuming one could get around sovereign immunity, but that is for another paper). Moreover, the lower court opinions that do compensate for a loss of view conspicuously fail to note that market would increase because the property is now protected from storm surge and

further inland do not have a reliable remedy against those who build closer to the water and block the view. Nor would they have a remedy against the state were it to construct a dune on the seaward side of the border between the private owner's property and the publicly held beach.

Ultimately, New Jersey cases provide a mixed-bag of results. No precedent is on point to direct the court or indicate how the court will hold. There is precedent for maintaining beach dune regulations as suggested by *Spiegle*. However, there are cases that have found a taking, such as *Klumpp*. It appears that cases in which the dune was present before the current owner purchased the property are decided in favor of the government. But there is no substantial difference between an owner that purchases a property with a dune and one whose property has a dune placed on it. They both have the same rights—their right to exclude has been limited, but not revoked—and they also have the same loss of view. It would be illogical to treat these owners differently. No case has dealt explicitly with the scenario outlined by this paper's hypothetical problem or the one in *Harvey Cedars*.

VI. Conclusion

The municipal construction of sand dunes on private property will likely be deemed a physical invasion, and thus will not reach the *Lucas* takings analysis. But that does not mean they shouldn't. This government action's character is similar to that of a regulation than it is a singling out of one property, entering to it to take it for governmental use, and leaving the burden on one property owner. This is a government action that should be shared by the community, and if a court sees fit, it may be appropriate to implement a tax scheme that requires inland owners to pay a little more than the beachfront owners so they share the burden too.

flooding. There is a record of dunes successfully preventing catastrophic damage. *Harvey Cedars Homeowners Demand Payment from Town for Spoiling Ocean View*, ASBURY PARK PRESS (Dec. 20, 2012), http://www.app.com/article/20121125/NJNEWS2002/101210014/0/SPECIAL/Harvey-Cedars-homeowners-demand-payment-from-town-spoiling-ocean-view?nclick_check=1.

Thus, courts should consider the analysis presented above. One of the crucial pillars of property law is that one cannot use his property in a way that harms his neighbor. That is exactly what is happening here. Beachfront owners should not get compensation from the government when they must allow placement of a sand dune because the government is acting in the public interest and it is not the type of action that typically warrants compensation.